PP

v.

MAGENDRAN MOHAN

HIGH COURT MALAYA, IPOH
BALIA YUSOF J
[CRIMINAL TRIAL NO: PCT 45-23-01]
4 JULY 2005

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Circumstantial evidence - Whether prosecution established prima facie case - Whether defence raised reasonable doubt*

The accused was charged with the murder of one Sujitha ('deceased') whose body was found near an overhead bridge at kilometre 88 of the Ipoh-Kuala Lumpur exchange on the PLUS Highway. The facts showed that the deceased and the accused were lovers who had lived together in a rented room in Petaling Jaya. They had spent the night at the deceased's mother's house in Ipoh and thereafter left together on a motorcycle headed for their place in Petaling Jaya. The sister of the deceased testified that the couple had quarrelled before they left and that the accused uttered the following words in anger to the deceased, "Saya akan ajar awak di sana." The body of the deceased was found the next day lying face upwards with both hands tied above the head. The neck was tied with a plastic rope with one end tied to a small tree nearby and the face was covered with blood with wounds on the head and cheek. There were also blood marks on the ground with the following items, namely, a pair of black spectacles, a pair of sandals, a T-shirt and a belt. The cause of death established was strangulation. When the accused was arrested, he was found in possession of some items belonging to the deceased, ie, a hand phone, a driving licence and a receipt from a pawnshop pertaining to jewellery. In his defence, the accused stated that he had dropped off the deceased at a place in Petaling Jaya as she had wanted to visit a friend of hers. He denied killing the deceased. He also denied bringing his friend, SP15, to the scene of the crime as stated by SP15 in his evidence. The accused also served a notice of alibi under s. 402A of the Criminal Procedure Code. The issue for the court's determination was whether the circumstantial evidence adduced was sufficient to prove the guilt of the accused beyond a reasonable doubt.

Held (finding the accused guilty as charged and sentencing him to death):

[1] The evidence produced by the prosecution against the accused was purely circumstantial. In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together points only to the guilt of the accused and it must not be capable of any other meaning. The onus on the prosecution is a very heavy one where the evidence consists of a series of circumstances considered together to form the rope to hang the accused person. (pp 596 f, 599 f & 600 g)

[2] The evidence of the accused pawning the jewellery belonging to the deceased might be neutral evidence. However, in light of all the circumstances of the case, that piece formed one of the series of circumstantial evidence against the accused. Personal belongings of the deceased such as her driving licence, her mobile phone that would normally be expected to be with her were found in the accused's wallet and in the house respectively. It was strange for the deceased to have left her mobile phone behind to see a friend. Likewise it was equally strange for the accused to be keeping her driving licence in his wallet for which no plausible reason could be accounted for. The accused too had said to SP14 that he had, albeit jokingly, killed the deceased when he was enquired about her absence. That was said twice by the accused to SP14. Although the accused might have uttered those words jokingly and SP14 did not believe what was said, the fact remained that the deceased was subsequently found dead, either by coincidence or otherwise. (pp 600 h & 601 a-c)

[3] The evidence of SP15, although submitted by the defence as being contradictory, could not be wholly dismissed. Taken in totality, SP15's evidence constituted and formed yet another strand of evidence in the many strands of evidence required to form a rope strong enough to hang the accused. Authorities are in abundance to suggest that even if a witness is found lying on one or two points, it is still permissible for the court to admit his evidence. Further, the evidence of SP15 that it was the accused who took him to the scene of the crime remained unchallenged and so was the evidence that the accused became restless after failing to locate the deceased at the place and had left the scene in a hurry. The failure to examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. (pp 602 c-d & 611 b-c)

[4] The accused was the last person seen alive with the deceased. The body was found at a location *en route* the journey taken by the accused to the house in which they rented a room. The evidence showed that the murder took place at the place where the body was found. It was highly improbable that the murder took place somewhere else and the body subsequently left or dumped at the scene. Further, the post-mortem revealed that the deceased could have been murdered the day she was last seen alive with the accused. Also, the accused and the deceased quarrelled the night before and a threat was made by the accused against the deceased. On the strength of the series of circumstantial evidence adduced and upon consideration of the cumulative effect of each strand of circumstantial evidence so produced, the prosecution had established a *prima facie* case of murder against the accused. (pp 602 h, 603 a-c, g & 604 f)

[5] Having evaluated the evidence given by the accused and the facts stated in his notice of alibi, the accused through his evidence had established his alibi from about 7pm onwards. However, that left another part of the alibi which was not explained, namely, the time lapse between 2.15pm and 7pm. Not much was offered by the accused and no witness was called to support his story. Although no adverse inference might be drawn against the accused by reason of his failure to call any witness to back up his story, the said failure is a matter that the court could take into account in assessing the weight of the evidence. In totality, the evidence put forth by the accused amounted to a bare denial of the offence for which he was charged. There was insufficient evidence to rebut the prosecution's case against him. Admitting that he was together on a journey with the deceased and subsequently dropping her by the roadside for her to meet a friend did not cast any doubt on the prosecution's case against him. (pp 608 e-h, 609 a, c & d)

[6] On the entire evidence adduced, the accused's story could not be considered reasonably true or consistent with his innocence. He failed to tender an explanation that was reasonable and probable that cast a doubt either as to the truth of the prosecution's case or as to his guilt. Accordingly, the defence failed to cast any doubt on the prosecution's case and the accused should be found guilty as charged. (pp 609 h & 612 b)

Case(s) referred to:
Balachandran v. PP [2005] AMR 321 ***(refd)***
Chan Chwen Kong v. [1962] MLJ 307 ***(refd)***
Chandmal & Anor v. State of Rajasthan [1970] SC 917 ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Goh Ah Yew v. PP [1949] MLJ 150 ***(refd)***
Jayaraman & Ors v. PP [1982] 2 MLJ 273 ***(refd)***
Kamis v. PP [1975] 1 MLJ 46 ***(refd)***
Karam Singh v. PP [1967] 2 MLJ 25 ***(refd)***
Khoon Chye Hin v. PP [1961] MLJ 105 ***(refd)***
Lim Guan Eng v. PP [1998] 3 CLJ 769 CA ***(refd)***
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
Muniandy & Anor v. PP [1973] 1 MLJ 179 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 CA ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1997] 1 MLJ 19 ***(refd)***
PP v. Lim Chen Len [1981] 2 MLJ 41 ***(refd)***
PP v. Lim Kuan Hock [1967] 2 MLJ 114 ***(refd)***
PP v. Saare Hama & Anor [2001] 4 CLJ 475 HC ***(refd)***
PP v. Tan Gong Wai [1985] 1 MLJ 355 ***(refd)***
Ram Avtar v. The State (Delhi Administration) AIR [1985] SC 1692 ***(refd)***
Tay Choo Wah v. PP [1976] 2 MLJ 95 ***(refd)***
Vasan Singh v. PP [1988] 3 MLJ 412 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 302, 402A
Blackstone's Criminal Practice 1991, pp 1674-1675

For the accused - Harjeet Singh; M/s PS Sohanpal & Sidhu
For the prosecution - Ahmad Sazilee Abdul Khairi DPP

Reported by Usha Thiagarajah

JUDGMENT

Balia Yusof J:
The accused was charged for the murder of one Sujitha a/p Subramaniam which according to the charge preferred against him took place between 2.15pm and 9pm on 13 April 2000 at the KM 88 Lebuhraya Persekutuan Ipoh/ Kuala Lumpur. The charge against him reads as follows:

> Bahawa kamu, pada 13 Ogos 2000, diantara jam 2.15 petang hingga 9.00 malam, di Kilometer 88, Jalan Persekutuan Ipoh - Kuala Lumpur, Behrang Station, di dalam Daerah Batang Padang, di dalam Negeri Perak, telah melakukan pembunuhan dengan menyebabkan kematian Sujitha a/p Subramaniam, KPT. No: 771003-02-5576, oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

On 14 August 2000 at about 2pm one Mohd. Arif bin Pandak Kamal (SP2) while doing supervisory work on pipe laying for water supply project in the Slim River area stumbled upon a dead body and went to report the same to SP1 who was on duty at the Balai Polis Behrang Station. Upon receiving the information SP1 together with a colleague went to the scene and discovered a body of a female wearing a dark colored bra and clad in blue jeans. The face was covered with blood and there were wounds on the head and the cheek. A pair of shoes, a belt, a black T shirt and a pair of spectacles were also seen nearby. A police report *vide* Behrang Station Report 288/2000 was lodged by this witness and produced and marked as exh. P2. Soon afterwards the scene of the crime was visited by the Investigating Officer, Cif Inspector Masuri bin Kasnan (SP16) together with a police photographer and another police officer one Cif Inspector Somu a/I Supramaniam (SP13). The scene of the crime was identified as KM 88 Lebuhraya Persekutuan Ipoh/Kuala Lumpur. According to the testimony of both SP13 and SP16 the body was lying upwards with both hands tied over the head with a rafia string. The neck of the deceased was also tied with a plastic rope with one end tied to a small tree. A sketch plan of the scene was drawn by SP16 and produced as exh. P76. The body was taken to the District Hospital Tanjung Malim where a post-mortem was conducted on 15 August 2000. During the post-mortem, the body was identified as Sujitha a/p Subramaniam by the members of the family of the deceased and also SP13. Cause of death was stated by the pathologist as ligature strangulation. Police investigation reveals that the deceased had on 12 August 2000 visited her family in Ipoh together with the accused and on 13 August 2000 at about 2pm both of them left together on a motorcycle for Kuala Lumpur. That was the last time the deceased was seen alive. It was established that both of them are lovers and staying together in a rented room in Petaling Jaya.

The evidence produced by the prosecution in the case against the accused is purely circumstantial. The sister of the deceased, SP5 testified that on 12 August 2000 the deceased came back to their mother's house in Ipoh with the accused whom she identified as the boyfriend of the deceased. They came on a motorcycle and during their conversations that evening suddenly there was an altercation between the deceased and the accused and the accused was heard angrily saying to the deceased, "Saya akan ajar awak di sana." The witness was however unable to say exactly why those words were uttered by the accused but affirmed that there was a quarrel of some sort between the accused and the deceased. The next day at about 2pm the witness saw both the accused and the deceased leaving for Kuala Lumpur on a motorcycle. That was the last time the deceased was seen alive by SP5. In her evidence this witness also stated that the conversation that evening revolved around the deceased's behaviour among which the accused informing the deceased's mother about love bites found on the deceased's neck.

Another sister of the deceased, SP8 testified that when the deceased came to visit them in Ipoh on 12 August 2000 she was wearing some jewelleries and she also brought along with her some jewelleries which were produced and marked as exhs. P5, P6, P7 and P8. These exhibits were recovered by SP13 from a pawnshop in Petaling Jaya.

The owner of the pawnshop SP4 gave evidence that an Indian man, later identified by him as the accused had on 14 August 2000 at about 11.45am came to pawn certain jewelleries namely exhs. P5, P6, P7 and P8. He issued a receipt, P10 indicating that RM320 was paid to the accused for the items pawned. In issuing the receipt P10, the witness testified that the particulars stated in the receipt as to the identity of the person and the item pawned has been verified by him before they were keyed into the computer. P10 bears the name and the identity card number of the accused person, a description of the items pawned and the amount paid for those pawned items. Exhibits P5, P6, P7, P8 were seized by the police from the pawnshop on 21 August 2000 and the exh. P10 was seized from the accused person at the time of his arrest by SP13.

The fourteenth prosecution's witness one Appayamah a/p Appalaidu is the owner of the house where both the accused and the deceased were renting a room. In her testimony, the witness stated that on one Sunday she went to a pasar malam and saw the accused entering the house. She asked for Sujitha (the deceased) from the accused and was told that the deceased has gone to her friend's house. Subsequently she did on another occassion ask for the deceased and again the accused replied that the deceased has gone to her friend's house. After four days of not seeing the deceased in the house, the witness again asked the accused the whereabouts of the deceased and the accused replied that he has killed her. The witness stated that she thought the accused was merely joking with her. The witness only realised that Sujitha had died after the police came to her house about a week after the deceased went missing. The deceased was renting the room for RM200 per month and after the accused joined her the rental was increased to RM330 per month. According to the witness the rental was paid by the deceased. This evidence as to the payment of rental by the deceased is very material when considering the evidence put forth by the accused in his defence later on in my judgment.

The next circumstantial evidence adduced by the prosecution in advancing its case against the accused is the evidence of SP15, a friend of the accused by the name of Krishnamurthi a/l Kanaratnam. The accused, Magendran is also known to this witness as Jeeva. This witness knows about the relationship between the accused and the deceased. According to SP15, there was an occasion when the accused brought him on a motorcycle to a place along the

highway and showing him the spot where the accused had a quarrel with the deceased. SP15 testified that he cannot remember the date and time of the visit. The witness stated that there was a bridge and the accused went up to see the area while he waited nearby. When a photograph marked as exh. P3 Bahagian A photo number 15 was shown to the witness, he admitted that the place he described in court as the place visited by him with the accused looks the same as the place or spot shown in the said photograph. The photograph was taken at the scene of the crime where the deceased body was found. It shows the PLUS Highway with an overhead bridge carrying the Lebuhraya Persekutuan Ipoh/Kuala Lumpur. The witness however admitted that he was not sure that the place shown in the photograph was the very same place that he went to with the accused. It was further stated by this witness that they went there merely to look at the place and after visiting the site, the accused became restless. The accused however was his normal self before visiting the site and it was the accused who suggested and took him there. During cross examination by the learned counsel for the accused, SP15 stated that he went to the site about two months before the arrest of the accused. During re examination however he stated he was not sure when the accused was arrested and was unable to ascertain whether it was two months or two days before the arrest but he remembers that the accused was arrested sometime in August 2000. Finally the witness stated that he and the accused went to the site one week before the arrest of the accused.

Next, there is the evidence of the investigating officer who among other things, in the course of his investigation recovered various items belonging both to the deceased and the accused. Among the items recovered were the jewelleries belonging to the deceased from the pawnshop, a Motorola handphone together with its sim card and also the deceased's driving licence. The Motorola handphone belonging to the deceased was found in the house rented by the accused while the deceased's driving licence was found in the possession of the accused together with a receipt from the pawnshop. They were found in his wallet at the time of his arrest by SP13. From the evidence of SP13 who carried out investigations as to the ownership of the sim card belonging to the phone and the production of exh. P37, a letter from the phone company which issued the sim card, I am satisfied that the mobile phone, exh. P34 belongs to the deceased.

It has always been emphasised that wherever circumstantial evidence is relied on by the prosecution in building up its case against an accused person, any such piece of evidence must tend only in one direction, that is to say, suggest or lend support to an inference of guilt. (see *Muniandy and Anor v. PP* [1973] 1 MLJ 179). In *Kamis v. PP* [1975] 1 MLJ 46, the appellant was convicted on a charge of murder and was sentenced to death. The evidence against him

were entirely circumstantial and on an appeal to the Federal Court, his conviction was affirmed. The learned trial judge had in his summing up to the jury stated that "for a court to rely on circumstantial evidence, the evidence when considered must point only to the guilt of the accused; it must not be capable of any other interpretation of any other meaning". The Federal Court in considering the summing up by the trial judge said that it was impossible to say that there was a miscarriage of justice. *Blackstone's Criminal Practice* 1991 at pp. 1674-1675 stated the following on circumstantial evidence:

> Circumstantial evidence is to be contrasted with direct evidence. Direct evidence is evidence of facts in issue. In the case of testimonial evidence, it is evidence about facts in issue of which the witness claims to have personal knowledge, for example, 'I saw the accused strike the victim'. Circumstantial evidence is evidence of relevant fact, ie facts from which the existence or non existence of facts in issue may be inferred. For example, the tribunal of fact is likely to attach more weight to a variety of individual items of circumstantial evidence, all of which lead to the same conclusion, than to direct evidence to the contrary coming from witnesses lacking in credibility.

Pollock CB likening circumstantial evidence to a rope comprised of several cords, said:

> One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.

Thomson a in *Chan Chwen Kong v. PP* [1962] MLJ 307 observed:

> ... where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?.

In dealing with circumstantial evidence, the court must be satisfied that the evidence when considered together must point only to the guilt of the accused and it must not be capable of any other interpretation or any other meaning. Thus in *Karam Singh v. PP* [1967] 2 MLJ 25 HT Ong FJ (as he then was) noted:

> .... In a case where the prosecution relies on circumstantial evidence, such evidence must be inconsistent with any other hypothesis than that of the guilt of the accused ... (See: *Muniandy & Anor v. PP* [1973] 1 MLJ 179, *Kamis v. PP* [1975] 1 MLJ 461 *Lim Foo Yong v. PP* [1976] 2 MLJ 259, *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] 2 MLJ 232).

In *Jayaraman & Ors v. PP* [1982] 2 MLJ 273 Syed Othman FJ has the following to say of a judge when dealing with circumstantial evidence. At p. 280 of the report His Lordship stated:

> I am well aware that the "irresistible" formula has been used by the courts here in dealing with circumstantial evidence. But I would like to refer here to *Mc Greevy v. Director of Public Prosecution* where it was argued at page 279, before the House of Lords that "in criminal trial in which the prosecution case, or any essential ingredient thereof, depends, as to the commission of the act, entirely on circumstantial evidence, it is the duty of the trial judge, in addition to giving the usual direction that the prosecution must prove the case beyond reasonable doubt, to explain to the jury in terms appropriate to the case being tried that this direction means that they must not convict on circumstantial evidence unless they are satisfied that the facts proved are (a) consistent with the guilt of the accused and (b) exclude every reasonable explanation other than the guilt of the accused.

The Federal Court, in *Chang Kim Siong v. PP* [1968] 1 MLJ 36 stated:

> The onus on the prosecution where the evidence is of a circumstantial nature is a very heavy one and that evidence must point irresistibly to the conclusion of the guilt of the accused. If there are gaps in it, then it is not sufficient.

Further deliberation on the issue of dealing with circumstantial evidence, the courts of this country has always been guided by the three tests formulated by the Indian Supreme Court in *Chandmal & Anor v. State of Rajasthan* (AIR) [1970] SC 917 where Sarkaria J said:

> It is well settled that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests. Firstly, the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. Secondly, those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused. Thirdly, the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. That is to say the circumstances should be incapable of explanation on any reasonable hypothesis save that of the accused's guilt. (See also: *Ghambir v. State of Maharashtra* AIR [1982] SC 1157).

As often been said, the onus on the prosecution where the evidence is purely circumstantial in nature is a very heavy one and where the evidence consists of a series of circumstances it is the combined strength of these circumstances considered together that will form the rope to hang the accused person.

The evidence thus presented before this court constituted of a series of circumstances which when considered together pin points to one irresistible conclusion that the accused murdered the deceased on the day and within the time stipulated in the charge. The evidence of the accused pawning the jewelleries belonging to the deceased may in itself be a neutral one. However when considered in the light of all the circumstances of the case, that piece

of evidence certainly forms one of the series of circumstantial evidence against the accused. Personal belongings of the deceased such as her driving licence and her, mobile phone which would normally be expected to be with her were found in the accused's wallet and in the house respectively. It is strange for a person who goes out of the house and in this case for the deceased to go out to see a friend as contended by the accused to have left her mobile phone at home. Likewise it is equally strange for the accused to be keeping the deceased's driving licence in his wallet for which no plausible reason can be accounted for. In so far as the conduct of the accused goes, SP14 gave evidence to the effect that the accused did say to her that he has killed the deceased after four days the deceased was not seen around the house. This was said twice by the accused to SP14. Although the accused may have uttered those words jokingly and the witness SP14 not believing what has been told to her, the fact remains that the deceased was subsequently found dead, either by coincidence or otherwise.

Next, there is the evidence of SP15 who was brought to a place where the accused purportedly had a quarrel with the deceased.

This witness was brought to the place by the accused just to show him where the quarrel took place and the accused suddenly became restless after visiting the scene. In his evidence SP15 stated that the place he visited with the accused is similar to the scene of crime as shown in the photograph marked as exh. P3. According to SP15 the accused merely showed him the spot where he quarelled with the deceased and they went back immediately afterwards. While giving evidence, SP15 wavers as to the time when they visited the scene. During examination in chief, SP15 stated that he could not remember the time and date when they visited the place and in cross examination he stated it was two months before the accused was arrested. For the record, the accused was arrested on 21 August 2000. However during re-examination by the learned Deputy Public Prosecutor the witness admitted that he is not sure when the accused was arrested but remembers that it was in the month of August 2000 and further testified that they went to the place 10 days before the arrest and later changed it to one week before the arrest. Some comments must be made on the testimony of this witness. He was hard pressed for an answer both by the learned Deputy Public Prosecutor and the defence counsel in their respective examination of this witness. Having seen his performance in court and observing his demeanour, I came to the conclusion that I cannot totally reject his testimony. It is quite understandable that more than four years has lapsed since the incident took place and that he and the accused were buddies. Quoting a passage from the judgment of the Court of Appeal in *Lim Guan Eng v. Public Prosecutor* [1998] 3 CLJ 769, Gopal Sri Ram JCA observed and I totally subscribe and associate my self with the observation that:

> However, the law, recognizing that much depends upon the human factor and vagaries of life, refuses to lay down any absolute rule in the matter of evidence evaluation. Witnesses are but human. Testimony may often be colored by emotion, benign or malice. Not all witnesses speak the whole truth, despite the oath or affirmation administered to them. Not all witnesses are devoid of bias of one sort or another. Recollection of events, is seldom, if ever, perfect. Two or more persons witnessing the same incident may give varying, yet truthful accounts of it according to their perception. There are so many other imponderables. The law would fail to meet the needs of society whose affairs it regulates if it does not take into account the incalculable variables that enter upon the scene when questions of appreciation of evidence arise.

In the light of the above said principle and consideration that ought to be weighed, I cannot wholly dismiss SP15 evidence for reasons of being contradictory as suggested by the defence. Taken in its totality, I am of the considered view that the evidence of SP15 constitutes and forms yet another strand of evidence in the many strands of evidence required to form a rope strong enough to hang the accused person. Authorities are in abundance to suggest that even if a witness is found to be lying on one or two points, it is still permissible for this court to admit his evidence. Thus, the observation of Thomson CJ in *Khoon Chye Hin v. Public Prosecutor* [1961] MLJ 105 is relevant. At p. 107 of the report His Lordship stated:

> If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence, the rest of his evidence must be scrutinized with great care and indeed with suspicion. To say, however, that because a witness has been proved a liar on one or two points then the whole of his evidence "must in law be rejected" is to go too far and is wrong. (See also *DeSilva v. Public Prosecutor* [1964] 30 MLJ 81).

There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons to accept one part of testimony of a witness and to reject the other. It is therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances (*PP v. Datuk Hj. Harun b. Hj. Idris (No. 2)* [1997] 1 MLJ at p. 19).

The evidence led by the prosecution against the accused points that the accused was the last person to be seen with the deceased. Both the accused and the deceased left Ipoh on a motorcycle at about 2pm for their house in Petaling Jaya. The body of the deceased was found on 14 August 2000, the next day after she had left her mother's house in Ipoh. The body was found at the KM 88 Jalan Persekutuan Ipoh – Kuala Lumpur. This location is en route the journey taken by the accused to his rented house in Petaling Jaya. From the evidence of the investigating officer, SP16, the body of the deceased was found

with her hands tied and her neck strangled with a plastic rope with one end tied to a small tree nearby. There were blood marks found on the ground and nearby the corpse were found items like a pair of black spectacles, a pair of woman sandal, a T shirt and a belt. In my view all these evidence suggest that the murder took place at the place where the body of the deceased was found. With all these indications it is in my view highly improbable that the murder took place somewhere else and the body subsequently left or dumped at the scene. The circumstances fit into the prosecution's case that the offence was committed at the place as stated in the charge and the circumstances point to the inference that it was perpetrated by the accused person.

Of no less importance was the circumstantial evidence given by the pathologist who performed the post-mortem on 15 April 2000 and opined that the deceased has been dead for about two days from the date of the post-mortem, meaning that the deceased could have been murdered on 13 April 2000 the day the deceased was last seen alive with the accused. The pathologist came to that conclusion upon his examination of the body by which time rigor mortis has already set in and based on other clinical findings and observation he made during the post mortem. The cause of death, being ligature strangulation has been explained fully by the pathologist which was based on the finding of strangulation mark on the deceased's neck and a fracture of the hyoid bone. The nature of the injury caused to the deceased is sufficient in the ordinary course of nature to cause death.

In her testimony, SP5, the sister of the deceased testified that while having conversation at her mother's house in Ipoh that night, the accused was heard saying angrily to the deceased:

> Saya akan ajar awak di sana.

and the two of them were quarrelling. According to SP5 the accused appeared to be angry. During cross examination by the learned counsel for the accused, this witness agreed with the suggestion that both the accused and the deceased were discussing about the deceased's behavior and went on to state that the quarrel had something to do with the accused relating to the deceased's mother about the love bite on the deceased's neck. She also stated that the accused threatened the deceased. From the evidence of the witness, I found that there was a quarrel the night before between the accused and the deceased and a threat was made by the accused against the deceased.

In cases where a chain of circumstantial evidence has been established by the prosecution, this court in dealing with evidence of this nature always adopts the views stated by of Faizal Ali J in delivering the judgment of the Supreme Court in *Ram Avtar v. The State (Delhi Administration)* AIR [1985] SC 1692, which states:

> At the very outset we might mention that circumstantial evidence must be complete and conclusive before the accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence. We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated. The learned sessions judge seems to have fallen into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.
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> ... It is not possible for us to consider the various chains of circumstances, mentioned above, in isolation by divorcing them from the other circumstances which are closely interlinked with them ...
>
> Before concluding we might observe that where circumstantial evidence consists of a chain of continuous circumstances linked up with one another, the court has to take the cumulative effect of the entire evidence led by the prosecution before acquitting or convicting an accused.

It will be seen that from the list of authorities referred, it has consistently been held that where the evidence against the accused person is wholly circumstantial the evidence proved must irresistibly point to one and only one conclusion, that is the guilt of the accused. On the strength of the series of circumstantial evidence adduced before me and upon considering the cumulative effect of each strand of circumstantial evidence so produced, I hold that the prosecution has established a *prima facie* case of murder against the accused and called upon him to enter his defence.

A *prima facie* case arises when the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that if unrebutted, it is sufficient to induce the court to balance in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that these facts existed or did happen. (*PP v. Dato' Seri Anwar b. Ibrahim (No. 3)* [1999] 2 CLJ 215, *PP v. Saare Hama & Anor* [2001] 4 CLJ 475, *Balachandran v. PP* [2005] AMR 321.

Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar b. Hashim & Anor v. PP* [1983] 2 MLJ 232 at p. 270 stated:

> It therefore follows that there is only one exercise that a judge sitting alone under Section 180 of the code has to undertake at the close of the prosecution case. He must subject the prosecution evidence to a maximum evaluation and ask himself the question: if I decide to call upon the accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no *prima facie* case has been made out and the accused would be entitled to an acquittal.

As stated by KP Gengadharan Nair JC (as he then was) in *PP v. Lee Hock Lai* [2004] 1 CLJ at p. 66 & 67, "maximum evaluation" refers to a proper and complete evaluation of all the evidence adduced to determine whether a *prima facie* case has or not been made out.

> Thus, all the evidence adduced has to be scrutinised properly and this should not be just a perfunctory, cursory evaluation or an exercise of skimming over the surface of the evidence only. The prosecution must make out the ingredients of the charge with the evidence adduced. If the evaluation of the evidence results in doubts in the prosecution's case at this stage of the proceedings itself then it cannot be said that a *'prima facie'* has been made out. The defence ought not to be called merely to clear or clarify the doubt. The benefit of the doubt, if any, at the end of the prosecution's case must go to the accused. Section 180 of the Criminal Procedure Code requires the court to "consider" whether the prosecution has made out a *'prima facie'* case against the accused. This consideration must be the total evaluation of the evidence adduced up to the stage. The degree of evaluation ie whether it should be a "maximum" or "minimum" one is not provided for but that, to my mind, would mean the court has to carefully and attentively consider all the evidence and thus would require a complete and full evaluation of the evidence.

On the aforesaid premises, I call upon the accused to enter his defence.

The accused gave evidence on oath. In his evidence, he stated that he and the deceased went to the deceased's parent's house in Ipoh on 12 August 2002 and spent the night there and came back to Kuala Lumpur together on 13 August 2000. They left Ipoh at about 2.15pm on 13 August 2000 on a motorcycle. After about an hours journey they stopped at a petrol kiosk and after filling some petrol the deceased mentioned that she had insufficient money to pay the house rental and straight away handed all her jewelleries to him for pawning. They then proceeded with their journey home to Kuala Lumpur. Upon reaching Taman Jaya near the Amcorp Mall the deceased told him to drop her there to see a friend. The accused went on to state that he reached home at about 5pm and after a short rest he then went out for dinner at about

6pm and was back home again at about 7pm. He met SP14 the house owner, and intimated to her that he had dropped the deceased to see her friend upon being asked by SP14 the whereabouts of the deceased. On 14 August 2000 he went to pawn the jewelleries at the Petaling Jaya old town. The accused further stated that SP14 continuously asked him the whereabouts of the deceased to which he jokingly replied that he has killed the deceased during the journey. The accused also stated that the deceased had on 2 or 3 occasions went out to see her friend and has also been out for one week to stay with one Zamsuria (SP12) her colleague at work. The accused further gave evidence that he had a quarrel with the deceased at Templer Park and left her there and subsequently went back there with SP15 but unable to find the deceased. The accused denies bringing SP15 to a place along the highway as stated by SP15 in his evidence and denies stopping at KM 88 during his journey home to Kuala Lumpur with the deceased on 13 August 2000. The accused denies killing the deceased on 13 August 2000 and went on to state that on 7 May 2003 his counsel, Mr. Harjeet Singh served a notice of alibi under s. 402A of the Criminal Procedure Code to the learned Deputy Public Prosecutor, Encik Abdul Rahim Noor in court. The notice of alibi was tendered by the defence and marked as exh. D85. At this stage, I find it necessary to reproduce the said notice of *alibi in extenso*. It reads thus:

DI ANTARA

PENDAKWA RAYA

LAWAN

MAGENDRAN A/L MOHAN

NOTIS DI BAWAH SEKSYEN 402A

KANUN PROSEDUR JENAYAH

MAHKAMAH SESYEN IPOH NO.2

PERAK DARUL RIDZUAN KES TANGKAP NO. 45-23-01

DI ANTARA PENDAKWARAYA

LAWAN

MAGENDRAN A/L MOHAN

NOTIS DI BAWAH SEKSYEN 402A

KANUN PROSEDUR JENAYAH

Ambil perhatian tertuduh Magendran a/l Mohan (tertuduh) akan menimbulkan pembelaan alibi terhadap tuduhan pindaan tersebut di atas yang bertarikh 9/9/2000 seperti berikut iaitu:

1. Pada jam lebih kurang 2.15 petang 13/8/00, tertuduh dalam perjalanan balik ke Kuala Lumpur dari Ipoh dengan Sujitha a/p Subramaniam ("Sujitha") menaiki motorsikalnya.

2. Tertuduh pada jam lebih kurang 4.45 petang 13/8/00 telah pun sampai di Kuala Lumpur dengan Sujitha dan di mana Sujitha telah meminta tertuduh menurunkan beliau di jalanraya Petaling Jaya, dan selepas itu tertuduh telah balik ke rumah di Petaling Jaya di 21, Jalan 14/40 Seksyen 14 Selangor.

3. Oleh itu, tertuduh tidak berada di kilometer 88 Jalan Persekutuan Ipoh-Kuala Lumpur Behrang Station di antara jam 2.15 petang hingga 9.00 malam 13/8/00 dan menyebabkan kematian kepada Sujitha a/p Subramaniam.

d.t.t

...

PEGUAM ORANG KENA TUDUH

Kepada:
Pendakwa Raya
Pejabat Penasihat Undang-Undang Negeri
Dan Timbalan Pendakwa Raya, Perak
Tingkat 1, Bangunan Perak Darul Ridzuan
Jalan Panglima Bukit Gantang Wahab
30512 Ipoh, PERAK DARUL RIDZUAN.

The accused did not call any witness to support his alibi. In so far as the provisions of s. 402A of the Criminal Produce Code is concerned, I find that the same has been complied with and the evidence given by the accused himself constitutes "evidence in support thereof" as provided in that section. The accused himself is a competent witness to support the alibi given through the notice served on the prosecution on 7 May 2003. Harun SCJ in the case of *Vasan Singh v. Public Prosecutor* [1988] 3 MLJ 412 referred to a passage in *PP v. Lim Chen Len* [1981] 2 MLJ 41 which quoted Azmi J (as he then was) saying:

As to the extent of the applicability of Section 402A(1), I am of the view that the words "evidence in support thereof" includes evidence of alibi given by the accused himself if he elects to give evidence on oath. Although the words "evidence in support of alibi" have not been statutorily defined in the Criminal Procedure Code, it can be taken to mean evidence tending to show that by reason of the presence of the accused at the particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission. The provision of Section 402A(1) which, *inter alia*, requires the

pre trial notice under sub section (1) to include particulars of the place where the accused claims to have been at the time of the commission of the offence, supports my view that the provision of Section 402 A(2) also applies to an accused person where he elects to be a witness and gives sworn evidence. (see also *Ku Lip See v. PP* [1982] 1 MLJ 194).

It must be remembered that the accused is charged murdering the deceased on 13 August 2000 between the hours 2.15pm and 9pm. In the notice of alibi (exh. D85) the accused admits that he was with the deceased between 2.15pm and 4.45pm on the same day. In his evidence the accused stated that they travelled together to Kuala Lumpur on a motorcycle at about 2.15pm and upon reaching Taman Jaya he dropped the accused near the Amcorp Mall. He reached home at about 5.00pm. He then went out again at 6pm to eat and came back to the house at about 7pm and it was at this time that he met SP14 the house owner together with her husband. SP14 gave evidence saying that she went to the night market on Sunday and saw the accused entering the house. No time however was stated by the witness as to her meeting the accused on that day. The accused repeated in evidence what was stated in his notice of alibi that he was at home after dropping the accused at Petaling Jaya. The next part of the notice is a denial by the accused that he was at KM 88 Jalan Persekutuan Ipoh - Kuala Lumpur between 2.15pm and 9.00pm and causing the death of the deceased.

Having evaluated the evidence given by the accused and the facts stated in his notice of alibi, I am satisfied that the accused through his evidence has established his alibi in that he was at home from about 7pm onwards. The evidence of the prosecution witness SP14 confirms that the accused was at home at about that period. However that leaves another part of the alibi which the accused has not been able to explain, namely the time lapse between 2.15pm and 7pm. Not much has been offered by the accused except by saying that he was on a journey with the deceased to Kuala Lumpur at about 2.15pm and dropping her at Petaling Jaya. The accused admits that he was with the deceased and merely explain that after dropping the deceased at about 4.45pm in Petaling Jaya, he headed for home. No witness was called by the accused to support his story that he was at home at 5pm and then going out to eat at 6pm and coming back home at 7pm. Was the accused at home between those times? I am aware that no adverse inference against the accused may be drawn by reason of his failure to call any witness to back up his story. All the accused has to do is create a reasonable doubt. (See: *Goh Ah Yew v. Public Prosecutor* [1949] MLJ 150). However the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had

probably no means of knowing that they might have any relevant evidence to give until the accused himself came to gave evidence (*PP v. Tan Gong Wai* [1985] 1 MLJ 355, *PP v. Lim Kuan Hock* [1967] 2 MLJ 114, *Tay Choo Wah v. PP* [1976] 2 MLJ 95).

As I have already said, the defence need not prove anything. All that the accused has to do is to raise a reasonable doubt. Even if I do not accept or believe the explanation given by the accused, that explanation must be able to raise a reasonable doubt in order to entitle him to an acquittal. (*Mat v. PP* [1963] 29 MLJ 263). In my considered view, the explanation given by the accused amounts to nothing at all. In its totality the evidence put forth by the accused amounts to a bare denial of the offence for which he was charged. Of course he says that he was with the deceased and that the deceased was still alive when he dropped her at Petaling Jaya at about 4.45pm, but that is insufficient to cast any reasonable doubt on my mind. His alibi defence covers only that period from 7pm onwards but there is nothing in his evidence to cast any reasonable doubt on the prosecution's case as to what has happened between 2.15pm and 7pm. There still remains a gap in the time between 2.15pm to 7pm, a period reasonable enough for the commission of the offence as set out in the circumstances of the case against him. There is insufficient evidence to rebut the prosecution's case against him. Admitting that he was together on a journey with the deceased and subsequently dropping her by the roadside for her to meet a friend does not cast any doubt on the prosecution's case against him.

To earn an acquittal, the court may not be convinced of the truth of the defence story or version. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in such an instance the court cannot convict the accused unless it is satisfied that the version given by the accused has not raised a reasonable doubt. It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the mind of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge *(PP v. Saimin & Ors, supra).*

Having deliberated on the entire evidence, I do not consider the accused's story to be reasonably true or consistent with his innocence. Further, I also do not share the accused's sense of humor when he told SP14 that he has killed the deceased. It is certainly not a joking matter to say or claim that you have killed somebody. When giving evidence, the prosecution witness SP14 merely stated that the accused told her jokingly that he has killed the deceased.

Perhaps that was just a general statement from the accused. However in his evidence, the accused stated that he jokingly told SP14 that he has killed the deceased during the journey. In his evidence on oath the accused said:

> Hari ketiga Appayamah ada tanya lagi, dia 'continuously' tanya. Saya bergurau dan saya beritahu secara bergurau saya telah bunuh Sujitha dalam perjalanan. Lepas itu dia tidak tanya lagi fasal Sujitha.

Was it a mere coincidence that Sujitha was killed? The evidence produced strongly suggests that she was killed en route her journey to Kuala Lumpur with the deceased. I have given every consideration to this undesigned coincidence and am of the considered view that it lends credence to the prosecution's theory that the accused killed the deceased during the journey to Kuala Lumpur.

In his defence the accused also admitted that the deceased scolded him in front of her family members that he regretted this. The scolding from the deceased came after he had complained about the deceased's behavior to the mother. It was pursuant to this that there was a quarrel between the accused and the deceased and he was heard threatening the deceased with the words "saya akan ajar awak di sana." The accused has certainly an axe to grind against the deceased.

As to the pawning of the jewelleries, the defence version was that the deceased had handed over all her jewelleries to the accused on their journey to Kuala Lumpur in order to raise some money to pay for the house rent. Strangely, there was no evidence at all to suggest that the money so raised was ever used by the accused to pay for the rental. In fact, the accused admitted that he did not know the actual amount of the rent and it was the deceased who pays the monthly rental. In his reexamination the accused stated that he only contributed RM200 for the rental. There is a lingering doubt in my mind as to the truth of the accused's story about the house rental.

The accused has also put up a story that there was a quarrel between him and the deceased which took place at Templer Park. During the said quarrel, the deceased insisted to be left alone and she wanted to meet a friend. She was left at a place where there was a bridge. The accused went home alone and narrated the incident to his close friend Krishnamurthi (SP15). According to him, SP15 insisted that he should go back to the place where he left the deceased and they subsequently went together to look for her but unable to find the deceased there. Later in the night the accused realized that the deceased was already at home. It was never established when this incident took place but from the accused's version it was certainly well before the date of the offence. The accused denies he took SP15 to the scene of the crime in the month of August 2000. SP15 on the other hand gave evidence to say that

he was brought to a place where the accused had a quarrel with the deceased sometime in August 2000 about a week before the accused was arrested. Upon reaching the place the accused searched the area near the bridge while he stood nearby. After a while they hurriedly went back to Kuala Lumpur and the accused, according to SP15 became restless. When SP15 was giving evidence for the prosecution he was hardly cross examined on this issue. It was never suggested or put to this witness that it was not the accused who insisted going to look for the deceased but SP15 himself. SP15 was also not challenged as to the accused's behaviour after failing to find the deceased there. Being unchallenged, the evidence of SP15 that it was the accused who took him to the scene of crime remains unchallenged and so is the evidence that the accused became restless after failing to locate the deceased at the place and leaving the scene hurriedly thereafter. I have in the earlier part of my judgment commented on the evidence of SP15. On this point I only need to say that there is a general rule that failure to cross examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony (*Wong Swee Chin v. PP* [1981] 1 MLJ 212).

In the course of his submission at the end of the defence case, learned counsel for the accused urged this court to consider the theory that the deceased was sexually assaulted and her body was dumped at the scene of the crime. He further submits that it is also inconsistent that the murder could be perpetrated by the accused who is the deceased's lover. I have given every consideration to this issue and come to the conclusion that there is no basis for the court to come to that conclusion in the light of the evidence produced. The evidence of the pathologist did indicate that there was an old tear in deceased's vagina and she was having her period and was wearing a sanitary pad at the time. The pathologist also found dried semen like traces on the thigh and *supra* pubic area of the deceased and took samples of it. The sample was sent to the Chemistry Department in Ipoh and SP10 found it to bear seminal stain. The same exhibit was later sent to the Chemistry Department in Petaling Jaya for DNA analysis but SP9 give evidence that he did not detect any seminal stain/spermatozoa on the same and as result of which no DNA profile was obtained from the sample. I have in the earlier part of my judgment made a finding that considering the facts and circumstances of the case and in particular the evidence given by the Investigating Officer (SP16) and his assistant SP13, it is highly unlikely that the deceased was murdered elsewhere and her body dumped at the scene of the crime. There is no evidence at all to suggest that the deceased was sexually assaulted. Both the deceased and the accused were lovers. The old tear on the deceased is not indicative of any recent sexual assault as suggested by the defence. The deceased was still wearing her panties and had a pad at the perineal region. The pathologist also found another layer of white inner pad covering the vulva region. The deceased

was having her period. In the premise, I hold the submission made by the learned counsel that the deceased was sexually assaulted is without basis and are mere conjectures.

I have analysed the defence story with the utmost care in order to see whether or not the accused's story is probable. Having done so as meticulously as I can, I must confess that I find the accused's story as totally unacceptable. The accused has failed to tender an explanation that is reasonable and probable which casts a doubt either as to the truth of the prosecution's case or as to his guilt. Accordingly, in my judgment the defence has not, on the balance of probabilities, cast any doubt on the prosecution's case and I therefore find the accused guilty as charged. Death is the only penalty known in law for an offence for which the accused is convicted and he therefore shall suffer the sentence of death by hanging.